FORT BERTHOLD LAND AND LIVESTOCK ASSOCIATION

v.

AREA DIRECTOR, ABERDEEN AREA OFFICE, BUREAU OF INDIAN AFFAIRS

IBIA 80-17-A (Supp.) Decided February 20, 1981

Appeal from decision of the Area Director, Aberdeen Area Office, Bureau of Indian Affairs, raising minimum grazing rental rate for allotted land on the Fort Berthold Indian Reservation.

Affirmed.

1. Grazing Permits and Licenses: Generally--Indian lands: Grazing: Rental Rates

   In ascertaining the reasonableness of a rental rate increase for grazing lands permitted under authority of 25 CFR Part 151, it was error for the Administrative Law Judge to conclude that "fair annual return" to which Indian landowners are entitled under the regulations is "something different and less than fair market value."

2. Grazing Permits and Licenses: Generally--Indian Lands: Grazing: Rental Rates

   The independent market survey utilized by the Bureau of Indian Affairs in justifying an increase in grazing rental rates

on the Fort Berthold Reservation cannot be regarded as invalid on grounds that off-reservation transactions were included in the survey.

3. Bureau of Indian Affairs: Administrative Appeals: Generally--Grazing Permits and Licenses: Generally--Indian Lands: Grazing: Rental Rates

In reviewing action of the Bureau of Indian Affairs in raising grazing rental rates, the Board of Indian Appeals should overturn the action only if it is found to be unreasonable. As long as the Bureau's action is supported in law and by substantial evidence, it would be an inappropriate intrusion into the Bureau's function for the Board to substitute its judgment for the agency's.

APPEARANCES: Phillip D. Armstrong, Esq., Minot, North Dakota, for appellant; Roger W. Thomas, Esq., Office of the Field Solicitor, Aberdeen, South Dakota, for respondent.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

The Board here reaches a final decision on an appeal taken by the Fort Berthold Land and Livestock Association, an organization composed primarily of Indian ranchers, from an action taken October 4, 1979, by the Area Director, Aberdeen Area Office, Bureau of Indian Affairs, raising the minimum acceptable grazing rental on the Fort Berthold Indian Reservation for the permit period November 1, 1976, through October 31, 1980.

In February 1980 the Commissioner referred the above matter to the Board of Indian Appeals for review and final Departmental decision pursuant to the provisions of 25 CFR 2.19(b). By order dated February 13, 1980, the Board referred the appeal to the Hearings Division of the Office of Hearings and Appeals for an expedited factfinding hearing and recommended decision by an Administrative Law Judge. The assigned Administrative Law Judge, Keith L. Burrowes, declined to hold a factfinding hearing at that time and instead filed a recommended decision with the Board on April 11, 1980, in which he concluded that the Bureau's action was improper as a matter of law. Judge Burrowes' legal opinion was rejected by the Board in a decision rendered June 6, 1980 (8 IBIA 90, 87 I.D. 201). The matter was remanded to the Administrative Law Judge with renewed instructions to ascertain the reasonableness of the rental rate set by the Bureau following an evidentiary hearing.

On September 25, 1980, Judge Burrowes entered a recommended decision regarding the reasonableness of the disputed rental rate increase. Interested parties were allowed until mid-November to file exceptions or other comments with the Board regarding the recommended decision. Final comments were received November 21, 1980, and all briefs have now been considered. 1/

1/ Appellant's statement dated Nov. 17, 1980, raises a procedural objection to the submission by the Bureau, through counsel, of its exceptions to the recommended decision. The objection is unfounded. The Board's regulations specifically authorize the filing of written exceptions to recommended decisions by Administrative Law Judges (see 43 CFR 4.368 (1979), 46 FR 7334, 7338 (Jan 23, 1981)), and this privilege was conveyed by the Board to all parties by order dated Oct. 9, 1980.

## Statement of the Issue

The matter at issue is the reasonableness of grazing fees set by the Area Director, Bureau of Indian Affairs, Aberdeen, South Dakota, which fees applied to the Fort Berthold Indian Reservation of North Dakota, and to, among others, the Fort Berthold Land and Livestock Association for certain lands permitted for the period November 1, 1979, to October 31, 1980. The increase in question pertains only to individually owned trust lands for which the minimum grazing rental was raised from $42 in 1979 to $57 for the year 1979-80. 2/

## Discussion, Findings, and Conclusions

In setting the minimum rental rate in question the Bureau relied in part on a market survey of 37 rentals of grazing land on or near the Fort Berthold Indian Reservation. The survey was prepared by Darrell Rasmusson, an independent appraiser-contractor, "for the purpose of providing some indication of the current prices being paid for cash rent of grazing land" (Rasmusson Narrative at 1). Mr. Rasmusson characterized the survey data provided in his report as the product of "arms length transactions where the landlord and tenant negotiated for the best rates possible with the least amount of government supervision." Ibid. Mr. Rasmusson stated that the survey data was gathered to show the "fair market value" of grazing rentals in the surveyed tracts (Tr. 13, 29).

---

2/ It is for the governing tribe to establish minimum grazing rental rates for the use of tribal land. 25 CFR 151.13(a).

Some of the grazing land surveyed by the independent appraiser had been leased on a price per-acre basis. Other lands were leased or permitted on an animal unit basis. For comparison purposes, all data used by the contractor was broken down into fees per animal unit month (AUM) (Rasmusson Narrative at 3). In the grazing trade, an "animal unit" refers to one adult cow with unweaned calf by her side or the equivalent thereof based on comparable forage consumption. 3/

The specific rental to be paid by a permittee of Indian grazing lands is determined on the basis of the AUM rate fixed for the range unit measured against its established carrying capacity. Carrying capacity may vary between tracts based on the amount of available forage, water, and other factors. The carrying capacity of a tract is multiplied by the AUM rate to arrive at the monthly fee. (Thus, grazing tracts A and B may be adjoining, of equal size, and assigned the same AUM rate. However, tract B may have twice the carrying capacity of tract A owing to density of forage and water sources. Tract B, because of its greater carrying capacity, will accommodate more cattle and produce more rental for the Indian landowner.) The Bureau of Indian Affairs calculates annual grazing rental rates on a 10-month basis to account for seasonal fluctuations in grazing productivity.

On the data collected in the case before us, the independent appraiser concluded that in the Fort Berthold area grazing leases and

3/ See Tr. at 10; Rasmusson Narrative at 3; see also 25 CFR 153.1(e)

permits for a duration of 3-5 years were being let during the period in question for $4.50 to $6.90 per AUM, or a median price of $5.70 per AUM (Rasmusson Narrative at 3).

The independent market study of Darrell Rasmusson was reviewed by Mr. Jim Quackenbush, a range conservationist with the Bureau of Indian Affairs, who had the responsibility of submitting a recommendation to his supervisor, the Assistant Superintendent, Fort Berthold Agency, regarding the establishment of a "fair rental rate for allotted land on the Reservation" (Tr. 38). Mr. Quackenbush, who has been a range conservationist with the Bureau for 7 years and who is experienced in proposing fair rental rates for Indian lands, testified that his objective was to recommend a grazing rental rate which coincided with "fair market value" (Tr. 38, 40, 50, 61, 64). Mr. Quackenbush stated that other factors were utilized in formulating a recommendation but that they, too, were geared to "fair market value." Ultimately, Mr. Quackenbush recommended that the Bureau adopt an annual grazing rental rate of $57 and the Aberdeen Area Director accepted this recommendation.

## Legality of "Fair Market Value" Standard

[1] Appellant's main argument in this appeal is that it was error for the Bureau to establish a minimum grazing rental on the basis of what "fair market value" for such grazing privileges may be.

Judge Burrowes agreed with appellant noting that the regulations require the establishment of a rate which "shall provide a fair annual return to the land owners." See 25 CFR 151.13(b). According to Judge Burrowes, "the 'fair annual return' due to the Indian land owners under these regulations is something different (and less) than the fair market value" (Recommended Decision at 2).

Judge Burrowes refers to no legal authority for his conclusion that fair annual return is something different and less than fair market value. The only authority cited in his opinion for this proposition is a fragment of the testimony given by Mr. Quackenbush. As we have already noted, however, Mr. Quackenbush repeatedly testified that he perceived his task to be the development of a rental rate consistent with "fair market value." Mr. Quackenbush summarized his understanding of the general grazing regulations and the import of the phrase "fair annual return" contained therein during cross-examination:

> Q. 25 CFR 151.13(b) dealing with the establishment of grazing fees. Does not that section require the Area Director to establish a minimum acceptable rental rate which provides a fair annual return?
>
> A. Yes.
>
> Q. Well that isn't the same as fair market value, is it?
>
> A. I would say it's the same thing. If they are not getting fair market value, they are not getting a fair annual return.

(Tr. 64).

The Board agrees with the position of the Bureau whose brief states on this point:

> We submit that the term "fair annual return" has substantially the same meaning as "fair market value."
>
> There is no language in 25 CFR Part 151 that might possibly be construed to require "fair annual return" to have some other meaning. In § 151.1 there are set forth many definitions of terms but no reason was apparently seen to define "fair annual return" to mean something other than it would appear to mean. As a matter of fact if "fair annual return" was intended to mean something new and different and something less than "fair market value" there would have been an absolute necessity to define it.

(Govt. Brief, filed November 10, 1980, at 7).

While the Board has found no administrative or judicial rulings expressly equating "fair annual return" and "fair market value" in the context of the Bureau's leasing or permitting of Indian lands, 4/ the terms have been used interchangeably over the years by the Bureau of Indian Affairs as well as in noted treatises on the Secretary's leasing authority. See, e.g., Chambers and Price, Regulating Sovereignty: Secretarial Discretion and the Leasing of Indian Lands, 26 Stan. L. Rev. 1061 (May 1974). 5/

---

4/ Nor, of course, have we found any rulings distinguishing the two.

5/ The treatise cited is primarily devoted to why and how the Secretary of the Interior may look to factors other than economic return to Indians in exercising his various leasing approval powers. While its primary emphasis is on the role the Secretary should play in the long-term leasing of tribal business leases, the article recognizes that with respect to short-term leasing or permitting of allotted lands, the Bureau's concern has been and possibly should continue to be insuring that the allottee receives "fair annual rental" or "fair market value" for his land. Pertinent excerpts are quoted below:

Judge Burrowes recognized that characterizing "fair annual return" as something less than "fair market value" penalizes the Indian landowner. His recommended decision states:

> At the outset, I must state my disgust and dismay at the regulations herein which force on the Bureau of Indian Affairs (hereinafter, BIA) the position of having to balance the interests of the competing land owners and livestock operators.
>
> If the land owners are to receive only a "fair annual return," rather than "fair market value," then the land owners are in fact being forced to subsidize the cattlemen. If the objective of the regulation is to be met, it should be done by a method that does not force one group of individuals to subsidize another group, nor through a method that forces the "bad guy" BIA employee into such an untenable position.

(Recommended Decision at 2).

In the absence of any persuasive authority that the term "fair annual return" as used in 25 CFR Part 151 is not the same as "fair market value," the Board does not understand why the Administrative

---

fn. 5 (continued)

"The approval power as presently exercised requires that the Secretary scrutinize only the financial fairness of the transaction--a 'fair market value' approach. The Secretary's regulations provide as the chief prerequisite for approval that the lease shall be for 'the present fair annual rental'" (at 1076).

"A virtue of the limited 'fair market value' approach is that it implies some acknowledgment by the Secretary that it is inappropriate for him to promulgate land use policies for Indian country. By stating in advance that he will approve any lease that provides a fair annual rental for the real estate, the Secretary is agreeing to ratify any determination a tribal lessor or allottee makes as to the social effects of a lease" (at 1083).

"We favor a combination of approaches--the 'free market' approach for short-term leases of tribal lands and a more 'preservative' approach for long-term leases, with retention of financial review for all leases of allotted lands." Ibid.

Law Judge was constrained to treat these terms differently, leading ineluctably to a degree of subsidization of ranchers by the landowners. In the Board's view, of varying possible interpretations which can be given to regulations, an interpretation which places the rulemaker in an "untenable position" ought to be avoided, not adopted.

Counsel for the Bureau correctly states, in our opinion, that the recommended decision misconstrues 25 CFR Part 151 in such a way "as to diminish the trust responsibility of the United States to the Indian landowners by the creation of a so-called trust responsibility to the cattle operator" (Govt. Brief, filed November 10, 1980, at 3).

The general provisions of 25 CFR 151.3(b) are quoted and relied upon in the recommended decision. We concur with the Bureau that the language of section 151.3(b), which recites as one of the objectives of 25 CFR Part 151 the need to "promote use of the range resource by Indians to enable them to earn a living, in whole or in part, through the grazing of their own livestock" must, by necessity, refer to some other method than the reduction of fees due the Indian landowner for the use of his land.

The objective of section 151.3(b) may be met in a number of ways under the regulations without depriving landowners of fair annual return or fair market value for their land. See, for example, 25 CFR 151.5 (establishment of range units for more effective utilization of the range resources); 25 CFR 151.10 (allocation of range units to

Indian corporations, Indian associations, and adult tribal members); and 25 CFR 151.11(a)(5) (Indian preference to adult tribal members, Indian corporations, and Indian associations in meeting high bids under competitive sales for grazing privileges).

The Secretary's trust responsibility to Indian landowners to insure protection of their economic interest through the permitting of Indian lands for grazing was specifically addressed in Coomes v. Adkinson, 414 F. Supp. 975, 992 (D.S.D. 1976). The court stated:

> The B.I.A. officers are not landowners with free choice in dealing with this land, but rather are servants of the Indian people. The Secretary's failure, through B.I.A. subordinates, to recognize and give serious consideration in their written decisions to the stated economic interest of the Indian landowners constitutes a serious breach of the Secretary's fiduciary duties.

## Establishing Fair Market Value

From its own review of the evidence adduced at the hearing of July 24, 1980, the Board is satisfied that the Bureau's increase of the minimum grazing rental on the Fort Berthold Reservation to $57 per year per animal unit for the period November 1, 1979, to October 31, 1980, was reasonable.

A starting point for evaluating the reasonableness of the $57 fee is the recommendation of Judge Burrowes that a reasonable rate, albeit

below "fair market value," would be $52 per year.

The basis for the $57 rate set by the Bureau predominantly rests on the independent market survey performed by Darrel Rasmusson. (See Tr. at 38; Recommended Decision at 3.) Although Mr. Quackenbush, the Fort Berthold range conservationist who endorsed the survey's findings, testified to the consideration of other factors in addition to the report in proposing the foregoing rate, these other factors appear to have served merely as an informal check on the validity of the data contained in the survey. 6/

Although the evidentiary hearing commenced with a presentation by the Government as to how the Bureau set the disputed rental rate, the burden of proof in this appeal is on appellant to show that the Bureau's action was unreasonable. Cf. Hazel Hawk Visser v. Area Director, Portland Area Office, 7 IBIA 22 (1978).

Appellant sought to invalidate the independent study in three major ways: (1) By contending that the survey improperly looked to fair market value instead of fair annual return; (2) by various challenges to the "comparable tracts" considered in the report; and (3) by

6/ For example, Mr. Quackenbush stated that he considered the following: The effects of inflation on the grazing market; knowledge acquired from conversations with various farmers and ranchers; and personal knowledge derived from observation of his father's cattle operation in Canada. Appellant managed to show deficiencies in each of the foregoing considerations, however.

the opinion testimony of its own expert witness, Mr. Vern Englehorn. We have already disposed of the first argument by holding that fair annual return signifies the same thing as fair market value under the provisions of 25 CFR Part 151. We turn to appellant's other primary contentions. 7/

[2] Appellant submits that the independent study should have excluded most, if not all, "comparable tracts" located off the reservation. Of the 37 comparables examined, only 9 were located on the reservation. The survey does reflect a lesser average value for on-reservation tracts as compared with off-reservation tracts. 8/

The Board does not agree that off-reservation transactions have little bearing on the fair market value of grazing privileges on the reservation. It is obvious to us that a cattle operator who has a choice of obtaining the use of grazing lands on or near the reservation will consider, among other things, the respective cost of obtaining such rights. Higher off-reservation fees could and apparently have led to higher on-reservation fees. There is no evidence of record to contradict this premise.

---

7/ A fourth line of attack on the increased rental was attempted by appellant through the testimony of various members of the association. The Board has reviewed this testimony and concludes that it amounts to self-serving proclamations that the increased rental was unjustified. For reasons set forth in this opinion and from consideration of the record as a whole, the Board does not agree that the increase was unjustified.

8/ The average for the nine on-reservation comparables was found to be $4.50 per ALM and the median $4.29. For the 28 off-reservation transactions, the average was $6.14 and the median $5.89. Combining the two areas, the average was $5.78 and the median $5.62. The average of the latter two figures is $5.70 from which a 10-month "annual" rate of $57 was suggested. See Recommended Decision at 4.

In a dispute over a lease effected under the provisions of 25 CFR Part 131, this Board rejected a recommended decision of an Administrative Law Judge who eliminated comparables from a market appraisal which were of generally higher values. Byrd v. Commissioner of Indian Affairs, 7 IBIA 142, 145 (1979), appeal pending sub nom., Byrd v. Andrus, C 79-229 (E.D. Wash., filed June 21, 1979). We stated:

> In comparing and reviewing the appraisals we disagree with Judge Clarke's removal from consideration of comparables Nos. 50 and 54, two of the comparables used by Swanson in arriving at the fair rental value. It appears that the foregoing comparables were dismissed merely because they were of greater value than the other comparables. We do not agree that only tracts of identical or lesser value should be used as comparables in an appraisal. [9/]

Consistent with the above, we do not think off-reservation comparables should be excluded from an appraisal of grazing transactions in this case merely because they have a higher average value.

Appellant challenges the use of off-reservation comparables in the independent survey because they are generally lease transactions as opposed to grazing privileges obtained by permit. According to appellant, reservation permit transactions are less costly than lease transactions because "permits can be revoked at any time, a grazing permit gives no interest in the land, lenders more readily provide funds to operators who have an interest in the grazing lands, [and]

---

9/ The Byrd decision is of additional significance wherein it shows that the Bureau of Indian Affairs regards the term "fair annual rental," as found in 25 CFR Part 131, to be synonymous with "fair market value."

reservation grazing lands are less well improved, there being less fencing and less ponds and dams, and remoteness from markets" (Appellant's Posthearing Brief at 6-7).

The Department's rules define a grazing permit as a "revocable privilege granted in writing limited to entering on and utilizing forage by domestic livestock on a specified tract of land." 25 CFR 151.1(k). The revocability of the privilege is strictly regulated, however. It may not be revoked until after due notice and only on the following grounds: Termination of the trust status of the land; violation of terms; allocation to Indian use; or allocation for grazing exempt from permit pursuant to 25 CFR 151.8. The latter two revocations may be accomplished only after 180 days written notice. See 25 CFR 151.15(b) and (c). 10/

Through its own expert witness, Mr. Vern Englehorn, appellant has sought to discredit the independent survey prepared for the Bureau by

10/ The Government argues that a grazing permit under Part 151 is usually more certain in duration than a lease under Part 131: "In actuality because Indian preference is implemented in the allocation and bid preference systems provided in obtaining grazing permits, which do not exist in obtaining farm and pasture leases, there is much longer considered use of Indian lands by the same permittees than the same lessees" (Govt. Brief, filed Nov. 10, 1980, at 9). The administrative record is insufficient to support a finding or conclusion on this allegation one way or the other. We would observe, however, that while the stability of grazing permits held by non-Indians on Indian land is affected by the provision of 24 CFR 151.15(c) which permits cancellation or modification of permits for conversion to Indian use, Indian permittees, such as in the case at bar, are apparently on better footing than non-Indian permittees. This would surely be true if the phrase "allocation to Indian use" is not intended to mean "Indian landowner use."

distinguishing many of the "comparable tracts" included in the survey. In apparent acceptance of Mr. Englehorn's testimony and narrative report, the Administrative Law Judge held in the recommended decision that 10 of the 37 tracts surveyed are not comparable. 11/ Specific reasons were not given by Judge Burrowes for the elimination of any of these tracts. The recommended decision states in general, however, that comparable tracts possessed of improvements, hay land, or performance promises from the lessor should not be considered unless the value of such factors is removed to arrive at straight grazing value (Recommended Decision at 4).

Neither Judge Burrowes nor appellant's expert witness attempted to factor out such "extra" values in their assessment of the comparable tracts relied upon by the Bureau. 12/ Instead, the comparables allegedly overvalued because of improvements or other factors were completely removed from consideration. Among other things, this approach overlooks the fact that lands permitted for grazing on the

11/ The tracts found unacceptable by the Administrative Law Judge are: 17, 21, 25, 28, 29, 30, 32, 33, 34, and 37, all of which are located off the reservation.

12/ In addition, appellant's expert witness offered no opinion as to the reasonableness of the fees set by the Bureau. In light of this fact, the Government has moved that his entire testimony be stricken (Govt. Brief, filed Nov. 10, 1980, at 14). The foregoing motion is without merit. It is clear that the purpose of the testimony given by appellant's expert witness was to show that the Bureau's fee increase was unreasonable and that it was based on invalid data. Had the Board accepted this opinion an appropriate order would be to set aside the decision and remand the case to the Bureau for a new appraisal to establish fair rental value. Cf. Junction Oil Co., Inc., 21 IBLA 78 (1975).

reservation have also received improvements and possible lessor-management assistance. For example, Quintin Sulzle, an area range conservationist with the BIA's Aberdeen Area Office, testified that the Bureau has invested $160,000 in various range improvements on the Fort Berthold reservation (Tr. 130).

In collecting data which would give an indication of the fair market value of grazing privileges in the Fort Berthold area, the Bureau's independent appraiser sought to provide a complete picture of the market, as the Government's brief summarizes:

> There is testimony about how certain highs and lows were eliminated from the report because in the appraiser's trained judgment, the information was unreliable. (Tr. p. 8 L. 7 to 8). Data was tested and reconfirmed (Tr. p. 25 L. 1 to 31). Data that reflected some compulsion and was not "arms-length" was tested for family or relative involvement (Tr. p. 29 L. 8 to 13). Other information was eliminated by the expert because it didn't make sense based on his financial judgment (Tr. p. 8-9 L. 20-4). As much data as possible was selected within the appropriate geographic distribution to obtain a "common basis." (Tr. p. 9 L. 5, p. 10, L.2 ).

(Govt. Brief, filed November 10, 1980, at 15).

[3] The extensive data gathered by the independent appraiser was used by the Bureau to arrive at a fair market value for grazing privileges on the reservation. The Bureau arrived at a figure which it considered reasonable. In our review of that determination, the Board's

requirement is to overturn the decision only if it is found to be unreasonable. It is possible that we could set a different rate from the evidence adduced as could anyone else. However, as long as the Bureau's action is supported in law and by substantial evidence, it would be an inappropriate intrusion into the Bureau's function for this body to substitute its judgment for the agency's. 13/

Our holding in this case is that the rental increase ordered by the Area Director was not unreasonable, contrary to law, or unsupported by substantial evidence. The Area Director's decision is therefore affirmed.

This decision is final for the Department.

Wm. Philip Horton
Chief Administrative Judge

I concur:

Franklin Arness
Administrative Judge

13/ In this regard, Departmental regulations preclude the Board of Indian Appeals from exercising discretionary authority delegated by the Secretary to the Commissioner of Indian Affairs, except as otherwise allowed by the Commissioner on a case-by-case basis. See 46 FR 7334, 7337 (Jan. 23, 1981).